



REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 229 of 2011

LOCHUCH NCHACHA.....1ST APPELLANT

LOROTO ELOTO2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The appellants are Lochuch Nchacha and Loroto Eloto. They were charged with four others in Criminal Case No. 9/2011, before the Senior Resident Magistrate's Court at Maralal, with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The other four who were charged with the appellants were acquitted after the trial magistrate heard their defences. The two appellants were convicted of the offence and sentenced to death. Being aggrieved by both the conviction and sentence, they filed Criminal Appeal No. 229/11 and 230/2011 which were consolidated to proceed as Criminal Appeal 229/2011. The appellants relied on similar grounds of appeal and supplementary grounds filed in their submissions. The grounds can be summarized as follows:-

- 1. That the trial magistrate relied on unsatisfactory identification evidence;**
- 2. That the identification parade was conducted contrary to the Forces Standing Orders (Cap 46 Laws of Kenya);**
- 3. That the offence of robbery with violence was not proved;**
- 4. That the Clinical Officer was not qualified to perform a post mortem;**
- 5. That the trial magistrate failed to consider the defence.**

Before we consider the grounds of appeal, we think that it is proper that we set out briefly by the evidence that was adduced before the trial magistrate. A total of nine (9) witnesses were called by the prosecution.

PW1, Kiplalan Leksait, a resident of Bendera Village recalled that on 28/12/2010, about 9.00 a.m, he was at home. His 43 goats were grazing near Bendera Airstrip and were being taken care of by Lepukuny. He heard gun shots, ran to the scene but found the goats had been stolen, and the herds boy had been shot dead. He did not see the robber.

PW2, Julius Lembasya of Bendera Village was herding his goats about 9.00 a.m. on 28/12/2010 and Lekupuny was nearby also grazing his goats. He heard a gun shot, he then saw Lekupuny running screaming and two people chasing him. They shot at him and he fell and one of them hit him with a

club. PW2 was about 20 meters away and was able to see the two appellants. He said it is the 1st appellant who fired at deceased and also hit him with a club. People came and they pursued the raiders. On 3/1/2011, he identified the 1st and 2nd appellants on a parade .

PW3 Lodulupe Lekupuny is the father of the deceased. He confirmed that the deceased was grazing goats near the Bendera Airstrip. PW3 heard gunshots at about 9.00 a.m., he ran there, found PW2 who told him that the son was dead and showed him the body. People pursued the robbers and 4 goats were recovered on the same day. Only one goat was his. He did not know who the robbers were.

PW4, Ewoi Losike, acting chief of Nachola Location heard gun shots on 29/12/2010 about 9.00 a.m. He later heard of the robbery. The District Officer summoned the chiefs who included PW5, Albert Lotini, Assistant Chief of Nachola and PW6, Amajong Sammy, chief of Kawapa Location to assist in looking for the goats and some suspects who had been named by neighbours. They said that the 1st appellant was in the list compiled by the District Officer. PW4, PW5 and PW6 were not present when the suspects were arrested.

PW7, Acting Inspector Christopher Ombati of Baragoi Police Station received a report of cattle rustling on 2/1/2011. He went to a hotel where he arrested the 2nd appellant and 2 others. He visited the scene where two spent cartridges were recovered. The post mortem was conducted by Peter Kiptoo Chelimo (PW8), a clinical officer at Baragoi. He found the deceased to be 14 years old, had a blunt injury to the head and a gunshot wound to the abdomen. He formed the opinion that the cause of death was excessive bleeding secondary to gunshot wounds. The identification parade, was conducted by Chief Inspector of Police Charles Maragu. On the first parade the 1st appellant was identified by PW2 and on the second parade the 2nd appellant was identified by PW2.

When called upon to enter their defence, the first appellant in his unsworn statement said that he was at work in a butchery when Police on security operation arrested him. He was ordered to sign some papers which he did after inducement with food but he denied committing the offence.

The 2nd appellant also denied committing the offence. He was in a hotel at Baragoi when he was arrested.

Ms Idagwa, learned counsel for the State conceded the appeal for reasons that the purported identification of the appellants by PW1 was not full proof. The appellants are not people PW1 knew before and that the description he gave to the Police was general and unsatisfactory; that the goats were not found with the appellants; that the evidence of PW2 and PW9 who conducted the parade were at variance.

This being the first appeal, it is required of us to re-evaluate the evidence, analyse it and arrive at our own independent findings and determinations, but bearing in mind that we did not have an opportunity to verify the demeanor of the witnesses.

The first issue that the trial court considered was whether a robbery occurred and we are in agreement with the magistrate that indeed the deceased Lukupuny was attacked by a group of raiders, according to PW2, about 30 of them. They were armed with rifles. They drove off the goats which the deceased was herding and fatally injured him. Spent cartridges were recovered at the scene of the murder by PW9 and his team. Besides, there is evidence of PW3, the deceased's father, and PW8 that the young boy was fatally injured during the robbery. All the ingredients of an offence of robbery with violence were satisfied.

The next question that the trial court considered is whether the robbers were sufficiently identified. The conviction of the appellants is based on a single identifying witness, PW2. The incident occurred at about 9.00 a.m., therefore in broad day light. According to PW2, when he first heard the gun shots, he could not see who was shooting. He then saw Lekupuny running, being chased by two armed men. By then, PW2 was lying in tall grass, so that he could not be seen. He said he saw the people from about 20 metres away. In our view, due to the long grass in which he was hiding, PW2 could not have had a clear view of the assailants. Besides, the court was not told how long PW2 was able to see if at all the faces of the

robbers and how long they took when assaulting the deceased. It seems when the robbers shot at the deceased, he fell and then one of the robbers struck him once and they retreated. PW2 had never seen the robbers before. When PW2 recorded his statement with the Police, he gave a description of the people he saw. Firstly, during cross examination by the 1st appellant, PW2 stated that he saw 3 bandits. On the description, he is said to have told the Police that one person was short and dark skinned while the other was light skinned and slim. PW2's statement to Police was read to him and he had said that the light skinned is the one who shot the deceased. When the 2nd appellant cross examined PW2, he said that he told Police that it is accused 2 who was brown. This description given to the Police totally contradicts PW2's evidence before that court. If the light skinned person is the one who shot the deceased and PW2 described the 2nd appellant as the light skinned one, then it should be the 2nd appellant who actually shot the deceased. However in court, PW2 said it was the 1st appellant who shot the deceased. The contradiction casts doubt on PW2's testimony as to whether he was able to identify the appellants.

PW1, 2 &3 all told the court that some goats were recovered on the same night of the robbery. PW3 said that in fact PW1 was the one who identified the goats PW3 said only one of his goats was recovered. No evidence was led on how or where the goats were recovered. They were not photographed. Besides, the recovered goats were never linked to the appellants.

The identification parade was conducted by PW9 and the identifying witness was PW2 whose evidence on identification has already been put to doubt. The appellants took issue with the parade. PW2 said that in the first parade, he found about 10 people. PW9 said they were 9 people on the 1st parade on which the 1st appellant was picked from. PW2 then said that on the 2nd parade, there were 8 people. PW9 confirmed they were 9 people. Maybe PW2 was excluding the appellants. We did not find any material contradiction in this evidence. Although the appellants alleged that the parade did not comply with the Force Standing Orders, the fact that some dressed in shorts and some in shirts did not make the parade to be improper because that is the manner of dress of the people.

The post mortem was conducted by a clinical officer (PW8). In our view, the fact that PW8 conducted the post mortem does not offend **Section 77** of the **Evidence Act**. This is because this was not a murder trial. All that the prosecution needed to prove in this case is that violence was visited on the deceased. The prosecution was not trying to establish the cause of death like in a murder case.

PW4, PW5, PW6 and PW7 told the court that they arrested the appellants based on information given to them by an informer. None of the informers was called as a witness. To base a conviction on evidence of an informer, the law is clear that such evidence must be corroborated or the informer must be called as a witness. In **Patrick Kabui Maina & Another v Rep [1986] KLR 889**, the Court of Appeal said:-

“If any accused is arrested on the strength of an information given by an informer and he is not put in the witness box to testify in chief and be cross examined, such evidence should be disregarded.”

Since the evidence of PW2 on identification is very shaky, all that was left is the arrest of the appellant based on evidence of an informer which is mere hearsay. Courts are always reluctant to rely on such evidence because it is open to abuse.

In the end, we find the conviction of the appellant to be unsafe, we hereby quash the conviction, set aside the sentence. The appellants are set free forthwith unless otherwise lawfully held.

DATED and DELIVERED this 26th day of October, 2012.

R.P.V. WENDOH
JUDGE

ANYARA EMUKULE

JUDGE

PRESENT:

.....for the appellants

.....for the State

Kennedy – Court Clerk

Interpreter – Ekiru Gilbert – English/Turkana